AMERICAN YEARBOOK OF INTERNATIONAL LAW
ISSN: 2732-9925
Vol.2, n.1, 2023 Article 6

Obligations erga omnes-tertium quid or processual element of peremptory rules in statu nascendi?

Milenko Kreća

DOI:10.5281/zenodo.10680105

Obligations erga omnes-tertium quid or processual element of peremptory rules in statu nascendi?

DOI:10.5281/zenodo.10680105

Prof. dr. Milenko Kreća
Ex Judge ad hoc of the International Court of Justice and European Court of Human Rights. Former member of Venice Commission and Permanent Court of Arbitration

Abstract: The present paper is a critical analysis of the obligations erga omnes in the international law according to the jurisprudence of the International Court of Justice and in comparative method with the International Law Commission. What exactly is erga omnes and the role in the international law is the main method of analysis of the present work.

Keywords: erga omnes; peremptory rules; international law; ILC; international jurisprudence; ius cogens; international responsibility.

General consideration

It seems that there is a common opinion doctorum that the concept of obligations erga omnes was born by the obiter dictum of the International Court of Justice in the Barcelona Traction case.

In that case the Court stated, inter alia, that:

"33... an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law[1]; others are conferred by international instruments of a universal or quasi-universal character"[2].

The opinion that ties the idea of obligations erga omnes to this dictum seems to narrow. For, the obligations erga omnes are consumed in the early doctrines of international public policy (ordre public international) as one of its constitutive elements in a broad arc from the natural law teaching on ius necessarium (De Vattel, 1758; De Martens, 1864; Wolf, 1934) via neonaturalist teaching on fundamental rights of states as absolute, primordial and permanent (Bonfils, 1914; Le Fur,

1ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23.

2ICJ, Barcelona Traction Light and Power Company, Limited Second Phase, I.C.J. Reports, 1970. para. 33.

1927) and general principles of law as constitutional principles at the top of pyramid of international law (Fon der Heydte, 1932; Verdross, 1971; Reimann, 1971) to understanding of UN Charter as "higher law" in the system of international law, international public order (ordre public) within the framework of universal international law (Bartoš, 1958) or, in the essential sense, of the constitution of the international community (McNair, 1961; Fassbender, 1998; Bernard, 2002).

Case obligations erga omnes in the jurisprudence of the ICJ

In the jurisprudence of the ICJ before the judgement in Barcelona case obligations erga omnes can be clearly identified. The understanding of erga omnes effects of some treaties is implemented in the Opinion of Court in Reparation for Injuries Suffered in the Service of United Nations. In that case the Court found, inter alia, that fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognised by them, together with capacity to bring international claims[3].

In its Advisory opinion concerning Reservation to the Genocide Convention, the Court stated in clear terms:

"(…) the principles underlying the Convention are principles which are

3ICJ Reports, 1949, p. 185.

recognized by civilized nations as binding on states, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge" (Preamble of the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely in scope" (emphasis added).

And further,

"In such convention the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions" (emphasis added).[4]

Erga omnes effects of obligation in the doctrine of the so-called objective regimes

Erga omnes effects of obligation is inherent in the doctrine of so-called objective regimes.

The doctrine was for the first time elaborated in the decision of the International Committee of Jurists relating to the status od Aaland Islands in 1920.[5]

As regards the validity of the 1856 treaties concerning the demilitarization of the Aaland Islands, the Committee stated:

"The provisions were laid down in European interests. They constituted a special international status relating to military considerations for the Aaland Islands. It follows that until these provisions are duly replaced by others, every state interested has the right to insist upon compliance with them. It also follows that any state in possession of the Islands must conform to the

4ICJ Reports, 1951, Advisory Opinion, p. 23.

5Aaland Islands question, League of Nations Official Journal, Special Suppl. No. 3, October 1920.

obligations, binding upon it, arising out of the system of demilitarisation established by these provisions"[6].

Consequently, the Sweden, as a non-signatory of the Treaty, by reason of the objective nature of the settlement of the Aaland Islands question by Treaty of 1856... may, as a Power directly interested, insist upon compliance with the provisions of this Treaty in so far as the contracting parties have cancelled it[7].

The decision had a strong echo in the doctrine (McNair, 1957; Fitzmaurice, 1960; McNair, 1961).

Arguments in support of obligations erga omens

Arguments in support of obligations erga omens as separate, relatively independent part of general international law.

Arguments in support of obligations erga omens as separate, relatively independent part of general international law are drawn from these sources:

– Judgement of the International Court of Justice in Barcelona case;

– ILC Articles on Responsibility of States for Internationally Wrongful Acts; and

– Jurisprudence of the ICJ following Barcelona judgement.

6Ibidem.
7Ibidem, p. 17.

Arguments in support of obligations erga omens: the ICJ judgement in Barcelona case

As regards the ICJ judgement in Barcelona case, it seems that judge Higgins was right saying that dictum of the Court "is frequently invoked for more that it can bear", since it "was directed to a very specific issue of jurisdictional locus standi"[8]. In the same sense principal legal adviser in the Court Thirlway as its "the finest unseen actor" (Hoss, Villalpando, De Brabandere, 2020). Considering para 34 of the Barcelona judgement in conjunction with its para 91, he noted that

"in the apparent withdrawal on the question of human rights (…) except in the case of genocide (…) the 1970. dictum is little more than an empty gesture" (Thirlway, 2013).

In fact, dictum of the Court in this case is, by its nature, an obiter dictum meaning incidental statement said in passing and as such not essential to the decision and therefore not binding.[9]

In that regard it should be pointed that the Court rejected Belgium's claim in a dispute over the protection of its citizens – shareholders of the Barcelona Traction Company, arguing that Belgium had failed to prove ius standi before the Court. The court found that the right to diplomatic protection of its citizens

8Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, Advisory opinion, Separate Opinion on para. 37.

9Such position of the *obiter dictum* is indicated in the structure of the judgement by the fact that in unusually extensive opinions of 12 judges appended to the judgement, obligations *erga omnes* are not mentioned at all.

had not been established by a treaty or by a special agreement, nor it was based on fairness (Thirlway, 2013)[10]

Therefore, the Court found the basis for rejecting Belgium's claim in the absence of an appropriate treaty or a special agreement, as well as fairness. Thus, in fact, the issue of the Belgium ius standi was resolved.

The reasons for including the obiter dictum in the judgement are unclear.

By formulating the obiter dictum the Court has departed from its judicial policy not to enter into consideration of general or specific issues that do not fall under the dispute.

Moreover, the Court did not follow the inherent limitation of its judicial task in terms that

"it cannot make a judgement sub specie ferenda (under the pretext of law) or anticipate the law before the legislation adopts it"[11].

The possible explanation of such action of the Court is given by its principal legal adviser prof. Thirlway. Probably based on discussions in the deliberation stage in the work of the Court closed to the public, he states that

"... it is more or less an open secret that the passage in the Barcelona Traction judgment-with its specific reference to 'protection... from racial discrimination' was intended to a public disavowal by the Court in its 1970 composition, of at least one element in the controversial decision given by the (barest) majority of the judges sitting in 1966" (in Sout West Africa case – M. K.) (Thirlway, 2013).

10As a consequence, from the practical point of view... neither the facts of the case nor the remainder of the Court's judgement give any further enlightment as to the application of the principle stated.

11Fisheries Jurisdiction (UK v. Ireland), Merits, ICJ Reports 1974, para 53; Fisheries Jurisdiction (FR of Germany v. Ireland), Merits, ICJ Reports 1974, para 45.

(Follows): Art.48

Article 48 (Invocation of responsibility by a state other than an injured state of ILC) on state responsibility provides:

"Any state other then injured state is entitled to invoke the responsibility of another state (…) if the obligation breached is owed to international community as a whole"[12].

The article avoid to use the term

"obligations erga omnes, giving a somewhat confused explanation that the term "erga omnes" conveys less information then the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all parties to a treaty"[13].

As stated, in the commentary to the Article

"the provision intends to give effect to the International Court's statement in the Barcelona Traction case where the Court drew an essential distinction between obligations owed to particular states and those owed towards international community as a whole".

With regard to the later, the Court went on to state that

"in view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations erga omnes".

Are articles on state responsibility capable to give effect to the "ICJ's statement in the Barcelona case"?

The Articles on state responsibility are not a codification in terms of Article 15 of the Statute of the International Law Commission. They are examples of new practise in the work of ILC based on Article 23(b) in terms of to "take note of or adopt the report". In this specific case the ILC recommended to the General Assembly simply to "take note" of the articles, with the caveat that a later stage the General Assembly should consider

12ILC Articles on state responsibility, 2002, p. 278.
13Ibidem.

the adoption of a Convention.[14] The General Assembly followed this recommendation "without prejudice to the question of their future adoption or other appropriate action". It took this decision without a vote, in the Sixth Committee as well as in the Plenary meeting.

Consequently, the srticles on the responsibility of states are, by their nature, closest to the semi-official codification and progressive development by the prestigious body of international lawyer such as International Law Commission. They have no binding force by themselves, but can possess it indirectly via customary law to the extent to which they express it.

(Follows): Jurisprudence of ICJ

Jurisprudence of ICJ following Barcelona Traction judgement.

There are two characteristics of judgments and advisory opinions, in which the Court refers to the obligations erga omnes.

Primo, consistent reference, either directly, or indirectly to rules if ius cogens; and

Secundo, tying erga omnes effects both to obligations and to rights.

Indirect way of referring to rules of ius cogens as demonstrated

14Report of the International Law Commission 2001, UN doc. A/56/10, paras. 67, 72, 73.

by obiter dictum of the Court in Barcelona case and widely accepted in the doctrine, implies enumerative determination of obligations erga omnes reduced to stating the rules of ius cogens without saying its name. So, the erga omnes obligations listed in the obiter dictum in Barcelona case completely coincide with the examples of the ius cogens norm as given in the commentary on the Article 50 (Treaties conflicting with the peremptory norm of general international law) (ius cogens) and in general agreement within the theory (Wolfke, 1974)[15].

Direct reference to ius cogens in consideration of obligations erga omnes is generally accepted in the jurisprudence of ICJ following obiter in Barcelona case.

In Armed Activities on the Territory of Congo case the Court stated in explicit term that

"The mere fact that rights and obligations erga omnes or peremptory norms of general international law are at stake..."[16].

In the Preliminary Objection phase in the dispute between Bosnia and Herzegovina versus FR of Yugoslavia, the Court emphasized that "the rights and obligations under the Genocide Convention are erga omnes rights and obligations"[17].

15United Nations Conference on the Law of Treaties, First and Second official Records, A/CONF.39/11/Add. 2, p. 68; For appropriate understanding of the doctrine-Lagonissi Conference on International Law 3-8 April 1966, Carnegie Endorsement for International Peace, Geneva, 1967. See also: Text of the draft conclusion on peremptory norms of general international law (*ius cogens*) adopted by the ILC on first reading, doc. A/74/10, p. 147.

16Armed Activities on the territory of Congo (New Application 2002), Judgment, ICJ Reports 2006, para. 125.

17Case concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide, Preliminary Objection, ICJ Reports, 1966,

The right of Palestinian people to self-determination as a right erga omnes was characterized by the Court in the Wall case, linking it with the expression obligations erga omnes.[18]

The Court given a substantially identical characterization of the right to self determination in its judgment in East Timor case[19] and in Advisory Opinion concerning the Chagos Islands[20].

It appears that the jurisprudence of the Court, from the Barcelona obiter dictum and onwards, does not recognize the obligations erga omnes as a separate and independent obligations in the structure and independent obligations in the structure of the international law.

Such a position seems to be confirmed in two recent cases in a specific way by abandoning erga omnes obligations in favour or erga omnes inter partes obligations.

In these recent cases, involving issues which according to Barcelona dictum, indisputably were by "their very nature (...) the concern of all states" (emphasis added) – genocide and torture[21] – the Court's reasoning shifted to obligations inter partes.[22] Those obligations in the light of Judge Higgins

---

para. 31.

18Construction of the Wall in the Occupied Palestine Territories, Advisory Opinion, ICJ Reports 2004, paras. 155, 159.

19East Timor case, Judgment, ICJ Reports 1995, para. 29.

20Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, ICJ Reports 2019, para. 180.

21Application of the Convention on the Prevention and Punishment of the Crime and Genocide (The Gambia v. Myanmar) and Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal).

22For Gambia v. Myanmar case see para. 108, 109; and in Belgium v. Senegal

observation that they are, in fact, “provision in an almost universally recognized multilateral conventions”, mean a kind of legal pleonasm, basically expression of the rule pacta sunt servanda in the frame of Article 60 of the VCLT (Termination or suspension of the operation of a treaty as a consequence of its breach).

Legal substance of obligations erga omnes and obligations inter partes

Institut de droit international, following the legal parameters in the Barcelona case, gives an comprehensive definition of obligations erga omnes in following terms:

“an obligation under general international law that a state owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all states

---

case, para. 68. The shift was not consistently implemented in Belgium v. Senegal case, because the Court in para. 99 of the judgment found that "the prohibition of torture is a part of customary international law and it has become a peremptory norm (*ius cogens*). That finding in terms of para. 33 of the Barcelona *dictum* means that prohibition of torture is an obligation *erga omnes* and not an obligation *inter partes*.

It is striking that the Court known for meticulous editing of its decisions, incorrectly cited the relevant part of the Barcelona judgment with the effect of identifying obligations *erga omnes* with obligations *inter partes*. Namely, in Belgium v. Senegal case the Court stated: “All the states parties “have a legal interest” in the protection of the rights involved (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para 33). These obligations may be defined as “obligations *erga omnes partes”* in the sense that each state party has an interest in compliance with them in any given case against torture (para. 68. of the judgment).

The same reasoning the Court applied in Gambia v. Myanmar case, para. 108 of the judgment. In fact, according to Barcelona *dictum* “All states...” not “All the states parties...” can be held to have a legal interest as regards obligation *erga omnes* (para. 33 of the judgment in Barcelona case).

to take action"[23].

It appears that a few elements are genus proximum of the obligations erga omnes:

i) they are obligations under general international law;

ii) obligations that a state owes in any given case to the international community in the view of its common values and its concert for compliance; and

iii) breach of obligations erga omnes enables all states to take action.

Relationship between obligations erga omnes and general international law

As regards first element of obligations erga omnes of cardinal importance is the question what is it that distinguishes those rules from other obligations of the general international law or the predominant part of these rules?

The difference should lie in the other two elements of the obligations erga omnes i. e. that a state owes them to the international community in the view of its common values and that, consequently, breach of them enables all states to take

23Institut de droit international, Krakow Session-2005, Fifth Commission-Obligation and rights *erga omnes* in the International law, Rapporteur Giorgio Gaya, Article 1(a). In that sense, also, ILC Articles on State Responsibility (Art. 48.); ILC Study on Fragmentation of International law: Difficulties arising from diversification and expansion of International Law, Report of the Study Group of ILC, paras. 382-384. et al.

action.

The difference seems strained and burdened with metaphysical tones.

It is debatable as to whether an obligation can be owed to international community in legal terms. It is rather an abstract, metaphysical thesis, because it assumes that international community possesses legal personality, for to owe means to be responsible to in this specific context. For, the responsibility is legal relation between legal persons in terms of international law by reason of internationally wrongful act. Therefore, the wording used in Article 5 of the Report of the Institute droit international – "all the states to which the obligation owed" – seems more appropriate.

It is considered that a state owes obligations erga omnes to the international community as an expression its common values. Are common values alone sufficient to give such effect?

The answer is definitely negative.

It goes without saying that common values are one thing and legal rules that express them are another.

Common values do not perform the function of law nor are they substitute for law, but the inspiration, driving force in creation of legal rules.

This is clearly demonstrated in the Advisory Opinion on Reservations to the Convention on Genocide. The Court stated,

inter alia, that:

"The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provision"[24].

As regards third element of obligations erga omnes-action of all states-the issue of its nature arises.

The formulation according to which "breach of obligation erga omnes enables all states to take action" implies that the obligations are rather moral or political than legal one.

The obligation in legal terms means duty to do action, leaving no choice to take action or not. The term "enable" place the "action of all states" on the level of political expediency as a matter of their discretion.[25]

Obligations erga omnes as an expression of community interest

In support to obligations erga omnes it is usually pointed out that they are an expression of community interest as opposed to bilateralism.

24Reservations to the Convention on Genocide, Advisory Opinion, ICJ Reports 1951, p. 23; emphasis added.

25Hence it is of fundamental importance that these actions are undertaken *lege artis*. In that regard article 5 of the Institut de droit international is relevant. It reads as follows: "Should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the states to which the obligations is owed: (a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations; (b) shall not recognize as lawful a situation created by the breach; (c) are entitled to take non-forcible counter-measures under conditions analogous to those applying to a state specially affected by the breach".

It is stated that

"bilateralism of international law means that international law obliges states reciprocally in their relations inter se and not towards each other as members of some more or less, general idea of an international public realm. The bilateralist mode of operation is particularly important in the law of state responsibility that might be characterized in terms "private justice" or an "every-men-for himself doctrine""[26].

Phenomenologically correct, dichotomy bilateralism/community interest strictly understood as two opposed interests is too bold and dogmatic. In reality, both interests are dialectically connected and intertwined.

Since its inception international law have been expressing common interest in specific historical circumstances. Even so-called classical, European international law was the normative expression of interests and values of European states operated in restrictively defined of international community.

It was applied by peoples and states that have accepted Christianity from the first time and these are primarily the old states with Germanic and Latin languages as well as the states of the new worlds that developed from the colonies of these nations (Manning, 1839; Wheaton, 1936)-as members of "l'humanite civilisée" (Lorimer, 1885) and international law applied outside Europe, in "l'humanite barbare et l'humanite sauvage" (Lorimer, 1885)-as inferior to European international law.

26Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, Report of the ILC Study Group, 2006, p. 194.

In today's international order, common interests are expressed not only in the rules of general international law, but also in international organisation of universal or quasi-universal nature as the institutional forms of common interests.

In these organisations and especially in the Organisation of United Nations, one of the tasks of which is

"to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained" (Preamble),

both the injured states and the states that are not injured by international illegal act are enable through appropriate rules of procedure to invoke responsibility of the state that breach a rule of general international law. Such state actions are a kind of surrogate for nonexistent actio popularis in international law.

Rights, obligations erga omnes and other rules of general international law

It follows that there is no substantive difference between rights and obligations erga omnes and other rules of general international law.

Prof. Thirlway observed that:

"There is of course a sense in which many (though not all) of obligation of states in general international law may be said to be obligations erga omnes" (Thirlway, 2013).

Judge Higgins in separate opinion in Wall case expressed the same idea in elaborated form:

"Finally, the invocation (para. 157) of "the erga omnes" nature of violations of humanitarian law seems equally irrelevant. These intransgressible principles are generally binding because they are customary international law, no more and no less. And the first Article to the Fourth Geneva Convention, under which "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" while apparently viewed by the Court as something to do with "the erga omnes principle", is simply a provision in an almost universally ratified multilateral Convention. The Final Record of the diplomatic conference of Geneva of 1949 offers no useful explanation of that provision; the commentary thereto interprets the phrase "ensure respect" as going beyond legislative and other action within a state's own territory. It observes that "in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavor to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally" (Pictet, 2015)[27].

Interweaving of individual/bilateral and common actions

In decentralized international community which does not know an authority that would ex officio deal with the protection of common interest as in internal law, the interweaving of individual/bilateral and common actions is inevitable.

Bilateralism, as a structural and functional principle of international order, is a matter of the past. In positive international law wherein

"interstate relationships become more complex, it is increasingly unlikely that any particular dispute will be strictly bilateral in character" (Damrosch, 1987).

In that sense, judge Weeramantry finds that:

27Construction of Wall in the Occupied Palestinian Territories, Advisory Opinion, ICJ Reports 2004, Separate Opinion of Judge Higgins, para. 39.

"An erga omnes right, is needless to say, a serious of separate rights erga singulum, including inter alia, a separate right erga singulum, against Australia, and a separate right erga singulum against Indonesia. These rights are in no way dependent one upon the another. With the violation of any state of obligation so lying on it, the rights enjoined erga omnes become opposable erga singulum to the state so acting"[28].

Relationship between obligations erga omnes and rules of ius cogens

It is noteworthy that the examples of erga omnes obligations in the Court's obiter dictum in Barcelona case completely coincide with the examples of the ius cogens norm as given in the commentary on the Article 50 (Treaties conflicting with the peremptory norm of general international law) (ius cogens) and in general agreement with the theory (Wolfke, 1974)[29].

In that sense also the jurisprudence of the ICJ following Barcelona obiter,[30] while Article 48 (Invocation by a state other than an injured state) of Articles on state responsibility refers to Barcelona obiter dictum only.

Despite the obvious matching of obligations erga omnes and rules ius cogens, there is opinion, that this match does not affect

28East Timor case, ICJ Reports 1995, Dissenting opinion of Judge Weeramantry, p. 172.

29United Nations Conference on the Law of Treaties, First and Second Session official Records, A/CONF.39/11/Add. 2, p. 68; See Lagonissi Conference on International Law 3-8 April 1966, Carnegie Endorsement for International Peace, Geneva 1967. See also: Text of the draft conclusions on peremptory norms of general international law (*ius cogens*) adopted by the ILC on first reading, doc. A/74/10, p. 147.

30See 4.3. infra.

the distinct and independent status of obligation erga omnes. It is stated in this sense that

"the source of ius cogens is in the VCLT, (Vienna Convention of the Law Treaties – M. K.) while obligations erga omnes were raised... in the Barcelona Traction" (Contreras-Garduno, Alvarez Rio, 2013).

The assertion is unfounded in both its elements.

The VCLT in its article 53 only conceptualized the substance of constitutional acts of universal political organization the League of Nations and the United Nations – "as higher laws" (Lauterpacht, 1936; Bartoš, 1958)-which established the hierarchical structure of international law (Kreća, 1980) as the very essence of the normative function of ius cogens.

In its study on ius cogens ILC in Conclusion II: Nature of peremptory norms of general international law (ius cogens) states that:

"Peremptory norms of general international law (ius cogens) reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law"[31].

It means that they are universal in scope relative materiae et ratione personae. For this reason, action of states subject to rules of ius cogens can be of any type, consisting in the exercise of legislative, administrative or judicial competence of a state, where and when they are intended to produce effects on the national or the international level (Orakhlelashvili, 2006). Per analogiam, all actions of international organization, including

31Draft conclusion of identification and legal consequences of peremptory norms of general international law (*ius cogens*) with commentaries, 2022, YILC 2022, vol. II, Part Two.

international courts, are subject to rules of ius cogens. These rules are basic criteria of legality, a normative vertical line around which all rules of international law group up.

It goes without saying that the court judgment and especially its obiter dictum is not capable per se to create new law.

Furthermore, that obligations erga omnes belong to secondary and not to primary rules (Orakhlelashvili, 2006). As a general remark to this assertion, it should be emphasized that secondary and primary rules form an organic whole. It follows after all from Barcelona obiter dictum that the obligations determined as obligations erga omnes belong to primary rules as well. In addition, the jurisprudence of the Court following Barcelona obiter dictum operates with expression "rights and obligations erga omnes", thus leaving the framework of exclusively secondary ones.

Finally, the difference in legal force is emphasized.

According to the Working Group of the ILC, erga omnes obligations differ from ius cogens in their legal force – while the latter have the capacity "to annual a norm in conflict – erga omnes obligations indicate the scope of application of relevant law and the emerging consequences"[32]. Furthermore,

"the norm that creates obligations erga omnes is owed to the international community as a whole and all states – regardless of their particular interests in a particular matter – are authorized to emphasize the responsibility of the

32ILC: Fragmentation of International Law..., p. 193, para. 380.

state in case of violation"[33].

As regards the "scope of application of relevant law", it seems obvious that rules of ius cogens as well as rules of general international law are of universal scope. In that regard, it should be pointed out that per definitionem the ius cogens norm is a rule of general international law (general element) and recognition and accepted by international community as a whole, as a rule from which no derogation is allowed under sanction of nullity (qualifying element).

Without that qualifying elements the rule is simply a rule of general international law, or in this particular context a truncated or mutilated rule of ius cogens.

Determination of obligations erga omnes as obligations that are different from the obligations under general international law

The determination of obligations erga omnes as obligations that are different from the obligations under general international law would be justified if the erga omnes obligations were specifically protected by additional procedure means in the form of actio popularis.

However, actio popularis is rather a theoretical construction. (Henkin, Pugh, Schachter, Smith, 1993; Thirlway, 2013)[34]

33Ibidem.

34Prof. H. Thirlway, Principal Legal Advisor of the ICJ after extensive analysis of the jurisprudence of Court found that "The conclusion which has to be accepted is

As far as the procedural consequences are concerned, the matter would of course be different if there was a legal obligation of states, recognized and accepted by the international community as whole, to take action against the state which breach the relevant obligations.

However, this is clearly not the case. The respective obligation is not designed as a legal obligation, the duty of states, but as a political or moral obligation (see, para. 6 infra). In that sense, Article 48 od Articles on Responsibility of States states that "any state other than injured state is entitled..." (emphasis added). ILC Study on Fragmentation of International Law even softens the nature of those actions by saying that states are "authorized to emphasize the responsibility" (emphasis added), the formulation de manière of political expediency, not as a legal duty.

---

that obligations erga omnes to which compulsory rights of protection have entered into the body of general international law still be – with possible exception of the obligation not to commit genocide – a purely theoretical category". In South West Africa case the Court clearly stated that the actio popularis was "not known to international law at present…". ICJ Reports 1966, p. 45. States are aware of it, so that, "Notwithstanding of apparel, acceptance of the erga omnes concept, no state has invoked it in judicial proceedings since its emancipation in the Barcelona case". Such a conclusion necessarily follows from the consensual nature of the jurisdiction of international courts. The ICJ clearly stated in the East Timor case: "The Court considers that the erga omnes character of a norm and the role of consent to jurisdiction are two different things. Whether the nature of the obligations involved the Court could not rule on the lawfulness of the conduct of another state which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right erga omnes". ICJ Reports 1995, 96, 102, para. 29. Armed Activities on the Territory of Congo, ICJ Reports 2002, Provisional Measures 219, 245, para 71.

Evaluation

All in all, it turns out that the obligation erga omnes could have an tenable and original effect only if they were understood as a processual element of ius cogens in statu nascendi, a judicial aspect of its erga omnes effects.

Otherwise, they would introduce more uncertainty and confusion and than they help in the progressive development of international law.

The understanding of erga omnes obligations, as a separate set of rules, which differ from ius cogens only in the absence of the effect of nullity, is controversial, implying transformation of bipartite structure of the general international law into a tripartite – ius cogens / ius dispositivum obligations erga omnes in the view of the solutions from Roman law and some national systems. A synonym for obligations erga omnes in this context is ius imperativum (Uibopuu, 1970).

In Roman law, there was a division into leges perfectae, i. e. laws, the violation of which entailed the nullity of the treaties; leges minus quam perfectae, which did not provide for nullity, put only punishment and other unfavorable consequences for the contractual party that violated the law, and leges imperfectae, which did not provide for any sanction for contrary treaties, even if they prohibited them. The division also found a place in some internal legal systems, mainly as a result of a different

understanding of the concept of public law.

There is no legal reason for the introduction of erga omnes obligations as a part of the normative structure of international law. Exactly opposite.

It would cause confusion. It took almost three centuries for international law to build rules of ius cogens and thus create the conditions for the rule of law over the free will of states. However, even today, there is no codification of specific rules of cogent nature.

Who would be competent to establish to which group – cogent or erga omnes obligations – belongs to a certain rule? In international legal order, there is no equivalent to authorities that determine the legal force of rules in domestic law.

Such an understanding of erga omnes obligations creates confusion about dispositive rules of international law also, tacitly suggesting its non-binding nature.

In fact, all rules of international as legal rules are in principle binding, (Virally, 1966) so that violation of any of them constitutes illegal act. The only exception would be permissive rules stricto sensu.

A rule of ius dispositivum has a binding character, but in contrast to rule of ius cogens, it can be replaced by an agreement of two or more parties in their inter se relations or excluded its application if the rights of third states are not violated.

Both in theory and in jurisprudence, illegality and validity of contractual agreements are connected. (McNair, 1966)[35]

In addition, the obligations erga omnes, understood as special set of rules, relativize and dilute the corpus iuris cogentis or some of its parts, since the erga omnes obligations as understood by the International Court of Justice in Barcelona case as well as in other relevant acts are rules of ius cogens.

Elements of confusion are also introduced by the fact that as a special object of obligations erga omnes, probably under the influence of so-called self-contained regimes, are considered the parts of international law that cannot be said to be fully formed – human rights law, environmental law and humanitarian law.

So, human rights, restrictively understood as individual rights, consist, in fact, of both legal rules and standards and values that have not received a perfect legal expression in totto (Malanczuk, 1997; Brownlie, 2008)[36] A number of human rights, including some basic rights, are subject to inherent and facultative limitations. Even in the practice of application of the European Convention of human rights, even the most developed system of protection of human rights, margin of appreciation in terms of

35Special Rapporteur H. Lauterpacht clearly stated in his Report on Law of Treaties that "The voidance of contractual agreements whose objects is illegal is a general principle of law"-YILC 1953, II, p. 155, para 5; Legal Status of Eastern Greenland, P.C.I.J., Ser. A/B, No. 53, p. 64; Expances case, ICJ Reports, 1962, p. 223.

36One of the leading authorities prof. Brownlie goes even further by claiming that "In the real world of practise and procedure, there is no such entity as "International Human Rights Law" (…)".

the space of maneuver in fulfilling obligations under the Convention is accepted.

Or, environmental law which essentially includes two parts – soft law and legal rules stricto sensu which are in the initial phase of its development.

As regards humanitarian law is also not without controversy, especially the Forth Geneva Convention and the Additional Protocol (1977). In the commentary of the Red Cross study, USA, the country that was engaged in a number of wars after the Second World War, pointed out that they cannot accept that "the rules which refer to the laws and customs of war express general information law" (Bellinger, Haynes, 2007).

(Follows): Erga omnes effects attributed to a set of rules that are determined as rights and obligations erga omnes

In a way, it is a bit strange that erga omnes effects are attributed to a set of rules that are determined as rights and obligations erga omnes, distinct from corpus iuris cogentis, and not to this corpus as set of absolutely binding rules as the basis and criterion of legality of acts in international law. And whose constitutive element is, inter alia, effects erga omnes.

Obligations erga omnes as political or moral obligations are applied on two levels.

It is applied in a form of actions in "relevant non-judicial arenas

such as international organs", (Henkin, Pugh, Schachter, Smith, 1993) vindicating community or collective interests, or to "take counter measures unilaterally of jointly against offending states" (Henkin, Pugh, Schachter, Smith, 1993). As regards actions in international organs, the UN Charter has established a collective interest which every state, member or non-member is authorized to bring it before principal UN organs (exempli causa, articles 11, 31, 25. of the UN Charter et. al.). These actions are undoubtedly in the general interest of the international community.

Another non-judicial actions are unilateral or joint counter measures against offending state outside the UN system. Such action open Pandora's box. By undertaking those actions, as learned author warns, a state

"appoint itself as a avenger of the international community (...) in the name of higher values as determined by itself"

and thus add to international chaos (Weil, 1983).

References

Bartoš, M. (1958). Legal force of United Nations Charter. *JRMP*, 1, 4ss.

Bellinger, J.B., Haynes, W.J. (2007). A US Government response to the International Committee of the Red Cross study on customary international humanitarian law. *International Review of the Red Cross, 89 (866),* 444-471.

Bernhard, R. (2002). *Articles 103. The Charter of UN. A commentary.* Oxford University Press, Oxford, 1298ss.

Bonfils, H. (1914). *Manuel de droit International public.* Paris, 235ss

Brownlie, I. (2008). *Principles of public international law.* Seventh Edition. Oxford University Press, Oxford, 554ss.

Contreras-Garduno, D., Alvarez Rio, I. (2013). A barren effort? The jurisprudence of Inter-American Court of Human Rights on ius cogens. In Haeck,Y., McGonigle, B., Burbano-Herrera, C., Contreras-Garduno, D. (eds.). *The realization of human rights: When theory meets practice: Studies in Honour of Leo Zwaak.* ed. Intersentia, Antwerp, 2013, 14ss.

Damrosch, L.F. (1987). Multilateral disputes. In L.F. Damrosch (ed.). *The International Court of Justice at a crossroads.* Transnational publisher, New York, 376ss.

De Martens, G.F. (1864). *Précis du Droit des gens moderne de l'Europe.* ed. Guillaumin et Cie, Paris, 44ss.

De Vattel, E. (1758). *Le droit des gens ou principes de la loi naturelle appliquée à la conduite ex aux affaires de Nations et des Souwerains.* London, par. 9.

Fassbender, B. (1998). The UN Charter as constitution of international community. *Colombia Journal of Transnational Law, 36,* 590ss.

Fitzmaurice, G. (1960). Fifth report on the law of treaties. *Yearbook of International Law Commission, II*, 69-107.

Fon der Heydte, F.A. (1932). Die Erscheinungs former des zvischenstaatlichen Recht: ius cogens and ius dispositivum on Völerrecht. *Zeitschrift für Völerrecht, 16,* 464ss.

Henkin, L., Pugh, R., Schachter, O., Smith, H. (1993). *International law.* West group, Minnesota, 558ss.

Hoss C, Villalpando S, De Brabandere E. (2020). In memoriam: Professor Hugh W. A. Thirlway (14 June 1937-13 October 2019). *Leiden Journal of International Law, 33(2),* 261-268.

Kreća, M. (1980). Quelques observations sur le problème de la hièrarchie des régles du droit dans le droit international public. *Yugoslav Review of International Law, 27,* 1.

Lauterpacht, H. (1936). Covenant as a "higher law". *British Yearbook of International Law, 34,* 55ss.

Le Fur, L.E. (1927). *Le théorie du droit naturel depuis le XVIIIe siécle et la doctrine moderne.* Recueil des Cours, vol. 18, ed. Brill, Bruxelles, 349-350.

Lorimer, J. (1885). *Droit International.* (traduit par E. Nys). ed. C. Muquardt, Bruxelles, 69ss.

Malanczuk, P. (1997). *Akehurst modern introduction to international law.* ed. Routledge, New York, 100ss.

Manning, W.O. (1839). *Commentaries of the Law of Nations.* Sweet & Maxwell, London, 65ss.

McNair, A.D. (1957). Treaties Producing Effect "Erga Omnes". *Scritti di diritto internazionale in onore di Tomaso Perassi.* ed. Giuffrè, Milano, 23-36.

McNair, B. (1961). *Law of treaties.* Oxford University Press, Oxford, 218ss.

Orakhlelashvili, A. (2006). *Peremptory norms in international law.* Oxford University Press, Oxford, 216ss.

Pictet, J.C. (2015). *The Geneva Conventions of 12 August 1949: Commentary, IV Geneva Convention relative to the protection of civilian persons in time of war.* ICRC, online version, 16ss.

Reimann, B.H. (1971). *Ius cogens in Volkerrecht: Eine quellenkritische Unterschung.* ed. Schulthess, Zurich, 73-75, 53.

Thirlway, H. (2013). *The law and procedure of the International Court of Justice.* Oxford University Press, Oxford, 100ss.

Uibopuu, H.J. (1970). Interpretation of treaties in the light of international law: Art. 31, para. 3(c) of the Vienna Convention on the Law of Treaties. *Annuaire de l'A.A.A., 40,* 35, 39, 40.

Verdross, A. (1937). Forbidden treaties in international law.

American Journal of International Law, 60 (4), 572ss.

Virally, M. (1966). Reflexions sur le jus cogens. *Annuaire Français de Droit International, 12,* 9ss.

Weil, P. (1983). Towards relative normativity in international law. *American Journal of International Law, 77,* 413, 433.

Wheaton, H. (1936). *Elements of international law.* Lawbook exchange, New York, 11-13.

Wolf, C. (1934). *Ius gentium methodo scientifica pertractatum.* (The Classics of International Law, translated by J. H. Drake). ed. Clarendon, Oxford, paras. 2, 3, 9ss.

Wolfke, K. (1974). Ius cogens in international law. *Polish Yearbook of International Law, 6,* 175ss.